

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: October 31, 2005

TO : Wayne Gold, Regional Director  
Region 5

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Wal-Mart Stores, Inc. (Gettysburg, PA)  
Case 5-CA-32580 512-5012-0100

This case was submitted for advice on the issue of whether the Wal-Mart Gettysburg store disparately enforced its facially valid no-solicitation policy.<sup>1</sup>

We conclude that the Wal-Mart Gettysburg store did not disparately enforce its facially valid no-solicitation policy, and that the Region should dismiss the allegation, absent withdrawal.

### FACTS

Wal-Mart Stores, Inc. (Wal-Mart) maintains a written no-solicitation policy that has been previously found to be facially valid by the Division of Advice.<sup>2</sup> The policy states:

Wal-Mart Stores, Inc. strives to provide an atmosphere for our customers and Associates that is free from solicitation and the distribution of literature inside our facilities. Our Associates are to be focused on being productive and providing excellent customer service. Therefore, Wal-Mart Stores, Inc., does not allow the distribution of literature in any selling or working areas of the facility at any time. Wal-Mart Stores, Inc. also does not permit solicitation in any selling area of the facility during business hours or in working areas when Associates are on working time.

Wal-Mart's written policy further defines "solicitation" as "to request or seek, in writing or orally, donations, help,

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<sup>1</sup> The remaining allegations of the charge, submitted pursuant to Memorandum OM 00-24, are addressed today in a separate Advice Memorandum.

<sup>2</sup> Wal-Mart Stores, Inc., Case 4-CA-32391, Advice Memorandum dated November 19, 2003.

or the like for any cause...." This no-solicitation policy is in effect at the Gettysburg store.

On February 28, 2005,<sup>3</sup> the Charging Party, a known Union adherent, was approached at his work station by an Assistant Store Manager. The Assistant Store Manager stated that he had heard from other employees that the Charging Party was approaching them about the Union and told the Charging Party, "You know you're not allowed to do that on the floor." The Charging Party denies approaching employees about the Union on the floor. The Charging Party did not receive any discipline arising out of this incident.

Wal-Mart alleges it received a complaint<sup>4</sup> on February 26 from an Associate who stated that while she and the Charging Party were working on the floor, the Charging Party repeatedly asked her for her address so that he could mail her a packet of Union information. After she provided her address, according to Wal-Mart, the Charging Party repeatedly approached her while they were both working to ascertain if she had received the Union information. Another employee testified to the Region that in March, the Charging Party approached her during working time, near the cash registers, and asked for her last name so that he could ascertain her phone number. The Charging Party stated that he would call her about the Union.

Other evidence, including employee affidavits, indicates that Wal-Mart tolerates employees talking about matters not related to work, while on work time in working areas, although employees have been reprimanded when such conversation became "excessive" or interfered with work.

#### ACTION

We conclude that Wal-Mart's Gettysburg store has not disparately enforced its facially valid no-solicitation policy by informing the Charging Party that he could not solicit for the Union on the work floor during work time.

In Washington Fruit and Produce Co.,<sup>5</sup> the Board recently upheld warnings issued by the employer to employees for conduct violative of its work time no-solicitation rule, notwithstanding the employer's toleration of general "talk"

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<sup>3</sup> All dates hereafter are in 2005, unless otherwise stated.

<sup>4</sup> It did not furnish a copy of this complaint.

<sup>5</sup> 343 NLRB No. 125, slip op. at 6-7 (2004).

on work time.<sup>6</sup> The Board distinguished workplace talk about subjects such as Sunday's football game, which was allowed by the employer, from employee efforts to "persuade" fellow employees to support a cause. The former type of conversation was allowed under the employer's rules and the latter was not, "irrespective of whether the cause [was] the union or something else," because it created "unnecessary apprehension and pressures for fellow employees."<sup>7</sup>

Similarly here, Wal-Mart maintains a valid no-solicitation policy. Upon allegedly receiving a complaint from an employee who was asked for her address while on working time in a working area, the Assistant Store manager told the Charging Party "You know you're not allowed to do that on the floor." Evidence indicating that Wal-Mart tolerates non-intrusive workplace talk does not establish that the Charging Party was treated disparately. The Charging Party approached co-workers not for simple conversation or to merely state a fact,<sup>8</sup> but with the intent of soliciting their contact information so that the Charging Party or Union could contact them at home. We conclude that the Charging Party's conduct constituted the initial stages of "solicitation," i.e., the seeking of "help" for "any cause." Therefore, Wal-Mart lawfully proscribed that conduct, pursuant to its lawful policy prohibiting solicitation on working time, notwithstanding its toleration of other kinds of employee conversations.

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<sup>6</sup> The employer's no-solicitation rule proscribed solicitation or promotion of support for any cause or organization during working time or during the working time of employees at whom such activity was directed. *Id.* at 5.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> See, Wal-Mart Stores, Inc. v. NLRB, 400 F.3d 1093, 1099 (8<sup>th</sup> Cir. 2005) (employee invitation to coworkers to attend a union meeting held not to be solicitation as it was more akin to a statement of fact than a question that required a response.)

For the foregoing reasons, Region should dismiss this allegation, absent withdrawal.

B.J.K.